SUPREME COURT, U. S.

SEP 14 196

JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

October Term, 1967

No. 370

INTER-AMERICAN CITIZENS FOR DECENCY COMMITTEE, ET AL.,

Petitioners,

versus

ANDY W. McBEATH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Respondent prays that a Writ of Certiorari be denied.

QUESTIONS PRESENTED

In addition to the questions presented for review by the petition for certiorari, one other question is presented:

1. Whether the District Court erred in not allowing petitioner an adequate opportunity for discovery in accordance with Rule 26 (e) of the Local Court Rules of the United States District Court for the Western District of Texas.

STATUTES AND FEDERAL RULES INVOKED

1. Rule 26 (e) Local Court Rules of the United States District Court for the Western District of Texas.

> (e) Completion of Discovery. In all civil cases, except in patent, anti-trust and trademark cases, all discovery shall be completed within three months after the case is at issue. In patent, anti-trust, and trademark cases, discovery shall be completed within six months after the case is at issue.

STATEMENT

This is a private anti-trust action based upon 15 USC Secs. 1, 15, and 26, and 28 USC 1337.

The District Court separately tried and heard the evidence directed to the issue of jurisdiction,

and granted petitioners' motion to dismiss, holding the evidence insufficient to invoke federal jurisdiction.

The Court of Appeals reversed, holding that in a case alleging a violation of the Sherman Act, the District Court in a preliminary hearing under Rule 12 (d) of the Federal Rules of Civil Procedure must allow a full presentation of the factual issues which are relevant to the jurisdictional issue.

The Court of Appeals further commented in its opinion that, although there was oral testimony, it was not sufficiently complete for the Court to make a proper determination of the jurisdictional question. Contrary to the statement in the instant petition, this comment did not shift the burden of proof to the District Judge or the defendants. The sole effect of this statement was to insure that the plaintiff had adequate time to prepare his evidence on the intermeshed factual issues which go to the merits as well as to jurisdiction.

It was not possible at a preliminary hearing for respondent to have a full opportunity for complete development of the jurisdictional issues to the extent that such issues are inseparable from the facts on the merits.

ARGUMENT

1. The judgment of the Court of Appeals should not be disturbed in that sufficient evidence to acquire jurisdiction was submitted in the preliminary

hearing. That there was sufficient evidence is supported by several cases, including a decision of this Court. The leading cases are: Lorain Journal Co. v. United States, 342 U.S. 143, 72 S. Ct. 181 (1951); Evening News Publishing Co. v. Allied Newspaper Carriers of New Jersey, 263 F. 2d 715 (3rd Cir. 1959) cert. den. 360 U. S. 929; Greenspun v. McCarren, 105 F. Supp. 662 (D. Nev. 1952). In all these cases the activities were essentially local in the sense that the newspapers involved did not have a wide circulation, yet the courts found adequate jurisdiction in each case.

There is no conflict, as petitioner contends, with the instant case and the decision of the Court of Appeals for the Ninth Circuit in Page v. Work, 290 F. 2d 323 (9th Cir. 1961) cert. den. 368 U. S. 875. The Court below adequately distinguished Page in that in the hearing on the jurisdictional issue "the court found from the evidence that the defendant's newspaper was primarily engaged in the publication of legal advertising; that this was purely a local activity directed to a local intrastate market." 374 F. 2d at 362. In the instant case, both the news and the advertising were not directed at solely an intrastate market. It should also be noted, regarding Page, that the Ninth Circuit seems to have a narrow view of anti-trust jurisdiction which was reversed both in Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705 (1959) and Radovich v. National Football League, 352 U.S. 445,77 S. Ct. 390 (1957).

Moreover, there is no conflict with the decision

of the Court of Appeals for the Second Circuit in Lieberthal v. North County Lanes, Inc., 332 F. 2d 269 (2d Cir. 1964). In Lieberthal both the trial court and the Court of Appeals agreed that the interstate activity would have been a "one-shot" affair which could not, of itself, convert the primarily local business into an activity which had a direct and substantial effect on interstate commerce. On the contrary, the uncontroverted, undisputed, clear-cut evidence in the instant case is well within the jurisdictional facts of Lorain and Greenspun.

2. Even if sufficient evidence was not submitted on the jurisdictional issue, the District Court should have considered more extensively the merits of the case. As the Court below correctly decided, where the factual and jurisdictional issues are completely intermeshed, "the jurisdictional issues should be referred to the merits, for it is impossible to decide one without the other." 374 F. 2d at 363. In support of this well-settled proposition the Court of Appeals cited: Land v. Dollar, 330 U.S. 731, 67 S. Ct. 1009, 91 L. Ed. 1209 (1947); Schramm v. Oakes, 352 F. 2d 143 (10th Cir. 1965); Fireman's Fund Ins. Co. v. Railway Express Agency, 253 F. 2d 780 (6th Cir. 1958).

Here, as before, there is no conflict with Page The Court below adequately distinguished Page on the grounds that there were "extensive pre-trial discovery proceedings and conferences, culminating in a pre-trial conference order containing 30 pages of admitted facts." Clearly, in light of the above

cited cases, McBeath should have been given the opportunity to present his evidence in a hearing on the merits.

The petitioners' contention that the Court of Appeals held that the District Court could not properly determine the question of jurisdiction prior to a trial on the merits by preliminary hearing under Rule 12 (d) of the Federal Rules of Civil Procedure inaccurately describes the scope of Court of Appeals' decision. The Court below acquiesced, at least by implication, to the "extensive pre-trial discovery proceedings" used in the Page case under 12 (d). Consequently, the scope of the Court of Appeals opinion was merely to insure that abundant evidence is submitted to the Court when the factual and jurisdictional questions are intermeshed.

3. Petitioner incorrectly submitted that the District Court accorded full opportunity to respondent to present evidence on the issue of jurisdiction. On the contrary, respondent was obviously given inadequate time to prepare evidence on both the factual and jurisdictional issues. The cause was set for hearing on plaintiff's application for preliminary injunction some 54 days after suit was filed. The hearing on the motion to dismiss was held one day after the motion was filed (R, pp.45 and 53). The local rules of court allow 6 months discovery time in anti-trust cases. Rule 26 (e), Local Court Rules of the United States District Court for the Western District of Texas.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

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